Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd

FEDERAL COURT (KUALA TERENGGANU) — SUPREME COURT MOTION IN SUPREME COURT CIVIL APPEAL NO 02-519 OF 1993
EUSOFF CHIN CHIEF JUSTICE, EDGAR JOSEPH JR AND WAN ADNAN FCJJ
31 MAY 1997

Civil Procedure *— Judicial precedent — Court of Appeal — Whether it was open to the Court of Appeal to disregard a judgment of the Federal Court on the ground that it was given per incuriam*

Land Law *— Charge — Validity of — Charge was executed in breach of Companies Act 1965 — Whether breach of Companies Act 1965 invalidated charge and loan transactions — Companies Act 1965 s 133(1) & (5) — National Land Code 1965 ss 241(3)(a) & 301(c)*

This was an application by Feyen Development Sdn Bhd for 'clarification and rectification' of the judgment of the Federal Court in *Co-operative Central Bank Ltd v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 ('*Feyen*') and to reverse it, having regard to the judgment of the Court of Appeal in *Harta Empat Sdn Bhd v Koperasi Rakyat Bhd* [1997] 1 MLJ 381 ('*Harta Empat*'). The application was a sequel to the judgment in *Feyen* which held that charge transactions under the National Land Code 1965 ('the NLC') which breached s 133(1) of the Companies Act 1965 ('the Act') did not give rise to civil consequences, and the subsequent judgment of the Court of Appeal in *Harta Empat* which held to the contrary, on the ground that that part of the judgment of the Federal Court was mere obiter.

It was submitted that the Federal Court in *Feyen* was mistaken when it treated the effect of a breach in s 133(1) of the Act on the validity of the charges of the NLC as the sole question for decision when it was merely a preliminary question of law. It was also argued that having held against the chargor on this point, the Federal Court should have remitted the proceedings to the High Court with a direction to hear and determine any other grounds the chargor might wish to advance for the purpose of establishing the existence of 'cause to the contrary' within the meaning of s 256(3) of the NLC, and had it so directed, the chargor would have put forward the following further objections, namely, that: (i) the Federal Court in *Feyen* had no jurisdiction to direct the High Court to order the sale of land, it being held under Land Office Title; having regard to the provisions of s 260(2) of the NLC which gave the jurisdiction to the Land Administrator; (ii) the chargee had charged penalty interest; and (iii) consequent to the decision of the High Court in favour of the chargor, the memorials relating to the charges concerned both in the issue documents of title and in the relevant register documents of title had been cancelled but after the chargee's successful appeal from that decision to the Federal Court, the memorials had been restored, although there had been no order of the Federal Court authorizing the same.

The questions which therefore arose were whether: (i) it was open to an intermediate court of appeal, such as the Court of Appeal in this country, to disregard a judgment of a final court of appeal such as the Federal Court on the ground that it was given per incuriam; and (ii) the decision of the Federal Court in *Feyen* was given per incuriam.

Held, dismissing the application:

(1) It was necessary for each lower tier to accept loyally the decision of the higher tiers and chaotic consequences would follow should the lower tier fail in this duty. It was therefore not open to an intermediate court of appeal, such as the Court of Appeal in this country, to disregard a judgment of a final court of appeal such as the Federal Court on the ground that it was given per incuriam. In this case, the Court of Appeal in *Harta Empat* had clearly flown in the face of established principles (see pp 836B–I and 837A); *Cassell & Co Ltd v Broome & Anor* [1972] AC 1027 followed.

(2) Notwithstanding the breach of s 133(1) of the Act, having regard to the effect of sub-s (5) of s 133 which preserves the validity of the charges, sub-s (1) of 133 is neither a prohibition nor a limitation within the meaning of sub-s (3)(a) of s 241 or s 301(c) of the NLC. This is an example of a statute in terms prohibiting a contract and yet providing expressly or impliedly that the contract will be valid and enforceable. It followed, therefore, that both ss 241(3)(a) and 301(c) of the NLC were irrelevant to the issues which arose for decision in *Feyen* and were therefore not even mentioned therein. It further followed that the judgment in *Feyen* on the point at issue was not given per incuriam. On the contrary, it was the judgment of the Court of Appeal in *Harta Empat* which was given per incuriam for it entirely overlooked the provisions of s 133(5) of the Act which would have been fatal to its reasoning (see pp 837D–F and 838A–B); *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313, *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, *Batu Pahat Bank Ltd v The Official Assignee* [1933] MLJ 237 followed and *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1992] 2 MLJ 365 overruled.

(3) Having regard to the course which the proceedings took from first to last, beginning in the High Court and ending on appeal before this court, it was plain that the question whether a breach of s 133(1) of the Act operated to invalidate the charges and loan transactions in *Feyen* was not a preliminary point at all for it dealt with the whole subject matter of the action without the need for viva voce evidence.

Furthermore, the sequence of events traced in the affidavit before the Federal Court provided considerable justification for the criticism that the present application was inspired by the

judgment of the Court of Appeal in *Harta Empat* and was clearly an attempt to invite this court to re-visit *Feyen* and to reverse it in the light of *Harta Empat* (see pp 838G–H and 840B).

(4) The jurisdiction point which was not taken before the judge in the court below was perfectly baseless for it was flatly contradicted by the copy of the order for sale by the Land Administrator and the reference by the land adminstrator to the High Court made pursuant to s 265(3) of the NLC (see pp 840I and 841A–B).

(5) The allegation that penalty interest had been charged was denied but, even if true, it would not amount to 'cause to the contrary' within the meaning of s 256(3) of the NLC (see p 841B–C).

(6) In allowing the appeal in *Feyen*, the Federal Court had set aside the judgment of the High Court, ie the whole of the judgment, including the order directing cancellation of the memorials. The parties were therefore restored to their status quo ante and there was thus clear authorization for the memorials to be restored (see p 841D).

[Bahasa Malaysia summary

Ini adalah satu permohonan oleh Feyen Development Sdn Bhd untuk 'penjelasan dan pembetulan' tentang penghakiman Mahkamah Persekutuan dalam *Co-operative Central Bank Ltd v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 ('*Feyen*') dan untuk mengakasnya, memandangkan penghakiman Mahkamah Rayuan dalam *Harta Empat Sdn Bhd v Koperasi Rakyat Bhd* [1997] 1 MLJ 381 ('*Harta Empat*'). Permohonan merupakan satu susulan kepada penghakiman dalam *Feyen* yang memutuskan bahawa transaksi gadaian di bawah Kanun Tanah Negara 1965 ('KTN') yang melanggar s 133(1) Akta Syarikat 1965 ('Akta tersebut') tidak menimbulkan akibat sivil, dan penghakiman berikutnya oleh Mahkamah Rayuan dalam *Harta Empat* yang memutuskan secara bertentangan, atas alasan bahawa bahagian penghakiman Mahkamah Persekutuan itu hanyalah obiter.

Ia dihujahkan bahawa Mahkamah Persekutuan dalam *Feyen* terkhilaf apabila ia menganggap kesan pelanggaran dalam s 133(1) Akta tersebut atas kesahan gadaian-gadaian KTN sebagai persoalan tunggal untuk keputusan walhal ia hanyalah persoalan undang-undang permulaan. Ia juga dihujahkan bahawa selepas memutuskan terhadap penggadai atas perkara ini, Mahkamah Persekutuan sepatutnya telah meremitkan prosiding kepada Mahkamah Tinggi dengan arahan untuk mendengar dan menentukan apa-apa alasan lain yang penggadai ingin mengemukakan untuk tujuan membuktikan kewujudan 'sebab bertentangan' dalam lingkungan maksud s 256(3) KTN, dan jika ia telah mengarahkan begitu, penggadai mungkin telah mengemukakan bantahan lanjut berikut, iaitu: (i) bahawa Mahkamah Persekutuan dalam *Feyen* tidak mempunyai bidang kuasa untuk mengarah Mahkamah Tinggi memerintahkan jualan tanah, kerana ia dipegang di bawah hakmilik Pejabat Tanah; memandangkan peruntukan s 260(2) KTN yang memberikan bidang kuasa kepada Pentadbir

Tanah; (ii) bahawa pemegang gadaian telah mengenakan faedah penalti; dan (iii) bahawa susulan daripada keputusan Mahkamah Tinggi memihak kepada penggadai, memorial yang berhubung dengan gadaian berkenaan kedua-dua dalam dokumen hakmilik keluaran dan dalam dokumen hakmilik daftar yang relevan telah dibatalkan tetapi setelah rayuan penggadai daripada keputusan itu kepada Mahkamah Persekutuan yang berjaya, memorial telah dikembalikan, walaupun tiada terdapat perintah Mahkamah Persekutuan yang memberikuasa atasnya.

Dengan itu, persoalan yang timbul adalah sama ada: (i) ianya terbuka kepada sebuah mahkamah rayuan perantaraan, seperti Mahkamah Rayuan di negara ini, untuk tidak mengendahkan suatu penghakiman mahkamah rayuan muktamad seperti Mahkamah Persekutuan atas alasan bahawa ia diberikan per incuriam; dan (ii) keputusan Mahkamah Persekutuan dalam *Feyen* telah diberikan secara per incuriam.

Diputuskan, menolak permohonan:

(1) Adalah perlu untuk setiap tingkat yang lebih rendah untuk menerima secara setia keputusan tingkat yang lebih tinggi dan akibat kucar-kacir akan menyusul jika tingkat yang lebih rendah gagal dalam kewajipannya. Oleh itu, ia tidak terbuka kepada sebuah mahkamah rayuan perantaraan, seperti Mahkamah Rayuan di negara ini, untuk tidak mengendahkan suatu penghakiman mahkamah muktamad seperti Mahkamah Persekutuan atas alasan bahawa ia diberikan per incuriam. Dalam kes ini, Mahkamah Rayuan dalam *Harta Empat* jelasnya telah mengabaikan prinsip-prinsip mantap (lihat ms 836B–I dan 837A); *Cassell & Co Ltd v Broome & Anor* [1972] AC 1027 diikut.

(2) Walaupun terdapat pelanggaran s 133(1) Akta tersebut, dengan mengambil kira kesan s 133(5) yang mengekalkan kesahan gadaian-gadaian, s 133(1) bukanlah satu larangan atau pun had dalam lingkungan maksud s 241(3)(a) atau s 301(c) KTN. Ini merupakan satu contoh statut dalam terma melarang suatu kontrak, tetapi memperuntukkan secara nyata atau secara tersirat bahawa kontrak akan menjadi sah dan boleh dikuatkuasakan. Ini bermakna bahawa kedua-dua ss 241(3)(a) dan 301(c) KTN adalah tidak relevan kepada isu-isu yang timbul untuk keputusan dalam *Feyen* dan oleh itu tidak disebut pun di dalamnya. Ia seterusnya bermakna bahawa penghakiman dalam *Feyen* atas hujah yang menjadi isu tidak diberikan per incuriam. Sebaliknya, penghakiman Mahkamah Rayuan dalam *Harta Empat* yang diberikan per incuriam kerana ia tidak mempedulikan sama sekali peruntukan s 133(5) Akta tersebut yang padah kepada penaakulannya (lihat ms 837D–F dan 838A–B); *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313, *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, *Batu Pahat Bank Ltd v The Official Assignee* [1933] MLJ 237 diikut dan *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1992] 2 MLJ 365 ditolak.

(3) Dengan mengambil kira perjalanan prosiding dari pertama hingga ke akhir, bermula di Mahkamah Tinggi dan berakhir dalam rayuan di mahkamah ini, adalah jelas bahawa persoalan sama ada satu pelanggaran s 133(1) Akta tersebut beroperasi untuk menjadikan gadaian-gadaian dan transaksi pinjaman tak sah dalam *Feyen* bukanlah satu hujah permulaan sama sekali kerana ia berurusan dengan perkara subjek keseluruhan tindakan tanpa keperluan untuk keterangan viva voce.

Tambahan pula, peristiwa berturut-turut yang dikesan dalam afidavit di hadapan Mahkamah Persekutuan memberikan justifikasi yang ketara untuk kritikan bahawa penghakiman Mahkamah Rayuan dalam *Harta Empat* memberikan inspirasi kepada permohonan ini dan jelas adalah percubaan untuk menjemput mahkamah ini melawat semula *Feyen* dan untuk mengakasnya memandangkan *Harta Empat* (lihat ms 838G–H dan 840B).

(4) Hujah bidang kuasa yang tidak dikemukakan di hadapan hakim di mahkamah bawah adalah tanpa asas kerana ia disangkal oleh salinan perintah jualan oleh Pentadbir Tanah dan rujukan oleh pentadbir tanah kepada Mahkamah Tinggi yang dibuat menurut s 265(3) KTN (lihat ms 840I dan 841A–B).

(5) Pengataan bahawa faedah penalti telah dikenakan dinafikan tetapi, jika pun benar, tidak merupakan 'sebab bertentangan' dalam lingkungan maksud s 256(3) KTN (lihat ms 841B–C).

(6) Dalam membenarkan rayuan dalam *Feyen*, Mahkamah Persekutuan telah mengetepikan penghakiman Mahkamah Tinggi, iaitu keseluruhan penghakiman, termasuk perintah yang mengarahkan pembatalan memorial-memorial. Pihak-pihak dengan itu dikembalikan kepada status quo ante mereka dan dengan itu terdapat kebenaran nyata untuk memorial-memorial dikembalikan (lihat ms 841D).]

Notes

For cases on judicial precedent, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2067–2090.

For cases on validity of charges, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1562–1564.

Cases referred to

Batu Pahat Bank Ltd v The Official Assignee [1933] MLJ 237 (folld)

Cassell & Co Ltd v Broome & Anor [1972] AC 1027 (folld)

Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd [1992] 2 MLJ 365 (overd)

Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313 (folld)

Harta Empat Sdn Bhd v Koperasi Rakyat Bhd [1997] 1 MLJ 381 (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)

Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410 (folld)

Young v Bristol Aeroplane Co Ltd [1944] 1 KB 718 (refd) A

Legislation referred to

Companies Act 1965 s 133(1), (5)
National Land Code 1965 ss 241(3), 256(3), 301(c)
Essential (Protection of Depositors) Regulations 1986 reg 9(1), (1)(b) B

Appeal from: Originating Summons No 31–266 of 1986 (High Court, Seremban)

Hira Singh (*Asbir Hira Singh & Co*) for the applicant.
Vijendran Ponniah (*Murali Achan* with him) (*Vije & Co*) for the respondent. C

Cur Adv Vult

Edgar Joseph Jr FCJ (delivering the judgment of the court): This application is a sequel to our judgment in *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 ('*Feyen*') D — which held that charge transactions under the National Land Code 1965 ('the Code') which breached s 133(1) of the Companies Act 1965 ('the Act') did not give rise to civil consequences — and the subsequent judgment of the Court of Appeal in *Harta Empat Sdn Bhd v Koperasi Rakyat Bhd* [1997] 1 MLJ 381 ('*Harta Empat*'), which held to the contrary E on the ground that that part of our judgment was mere obiter.

With respect, it is difficult to see how the criticism that this application by Feyen Development Sdn Bhd although couched in terms of a prayer for 'clarification and rectification' of our judgment in *Feyen*, is really a facade for inviting us to revisit *Feyen* and to reverse it having regard to *Harta* F *Empat*, can be rebutted. Our reasons for this will appear later.

In *Harta Empat*, the Court of Appeal, whilst on the one hand appeared to be paying lip service to our judgment in *Feyen*, when it said (at p 384, per NH Chan JCA):

> The question whether s 133(1) of the Companies Act 1965 ... operates to G invalidate a security provided by a company for a loan made to a director of the company by another person in contravention of the subsection or whether it merely prohibits the giving of such security on pain of incurring criminal liability is no longer justiciable, at least in this country, since the decision of the Federal Court in *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313. H

then embarked on an attempt to debunk our judgment in *Feyen* in the following remarkable passages (at the same page):

> The subsection [sub-s 133(1)] by itself does not invalidate the forbidden transactions, so that the company may incur civil liability for entering into them; see *Feyen*. However, before the company can be made liable, the I transaction itself must be a valid and enforceable one. In the instant case, we are concerned with a charge under the National Land Code 1965 ('the Code') so that the question that arises is whether the provisions of the Code operate to invalidate the charge.

> Feyen *did not refer to the provisions of the National Land Code when it considered the question of the validity of the two charge transactions in the case, nor did it discuss them. Therefore, any opinion expressed by Feyen on the validity of a charge must necessarily be obiter.* (Emphasis added.)

The provisions of the Code which the Court of Appeal assumed that the Federal Court in *Feyen* had overlooked were ss 241(3)(a) and 301(c). Commenting on these provisions, the Court of Appeal said, inter alia, this (at p 386):

> Put shortly, a charge is subject to 'any prohibition ... imposed by ... any... written law for the time being in force' (s 241(3)(a)). The charge takes effect upon registration (s 243). Registration of the charge is obtained by presenting it to the registrar (s 292(1)(c)) but only if the charge is fit for registration (s 301), and the charge is fit for registration if para (c) of s 301 is satisfied, that is to say, 'that the dealing which it effects is not contrary to any prohibition ... imposed by ... any ... written law for the time being in force (s 301(c)).

In conclusion, the Court of Appeal said this (at p 388):

> The upshot is this. Under the Code, the immovable property in the instant case could be charged but the charge was subject to any prohibition imposed by written law. Section 133(1) of the Act forbade the appellant company from providing the security for the loan made to its director by the respondent. The prohibition in s 133(1) had rendered the charge unfit for registration under s 301(c) of the Code. The charge is therefore invalid.

We are mindful of the fact that *Harta Empat* is the subject of a pending application for leave to appeal to the Federal Court, but counsel for Feyen, Mr Hira Singh — who was also counsel for the successful chargor in *Harta Empat* — had expressly relied on the judgment of the Court of Appeal in *Harta Empat* as authority for the proposition that charge transactions under the Code which breached s 133(1) of the Act did give rise to civil consequences and, not to put too fine a point on it, his application now before us prays 'for *clarification and if necessary, rectification*' of our judgment in *Feyen* (Emphasis added.). In these circumstances, whilst we are not at liberty to overrule *Harta Empat*, we are certainly at liberty to say whether having regard to the reasoning in *Harta Empat*, we are persuaded to depart from what we had said in *Feyen*. To put it another way, we are at liberty to say whether the decision in *Harta Empat* can stand with our decision in *Feyen*.

In the first place, we should like to deal with a point of wide ranging importance and this concerns the principle of stare decisis, which is a cornerstone of our system of jurisprudence.

In *Harta Empat*, the Court of Appeal in effect held that *Feyen* was not binding on it because it had overlooked certain provisions of the Code, to wit, ss 241(3) and 301(c). It was on the basis of this that the Court of Appeal relegated *Feyen* to mere obiter dicta. It is elementary that where, for example, a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court, the decision will have been given per incuriam (see the third exception, per Lord Green MR in *Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 718). On

the other hand, obiter dictum is a mere chance remark by the court and is used in contradistinction to ratio decidendi — the rule of law for which a case is authority. Clearly, the Court of Appeal meant to say that our decision in *Feyen* was given per incuriam.

The question therefore arises: is it open to an intermediate court of appeal, such as the Court of Appeal in this country, to disregard a judgment of a final court of appeal such as the Federal Court on the ground that it was given per incuriam?

Our task in answering this question has been made considerably easier by the assistance derived from the remarks of Lord Hailsham in *Cassell & Co Ltd v Broome & Anor* [1972] AC 1027, which indicated the reaction of the House of Lords to the Court of Appeal's refusal to follow a previous decision of the House on the ground that it had been given per incuriam.

Touching on the repercussions of the Court of Appeal advising judges of first instance to ignore decisions of the House of Lords, Lord Hailsham said this (at p 1054B–D):

> I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes v Barnard* as decided 'per incuriam' or 'unworkable', they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable. The course taken would have put judges of first instance in an embarrassing position, as driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee that other Lord Justices would have followed them and no particular reason why they should) and the House of Lords. But, much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords and in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.

And in a famous passage (at p 1054D–E), Lord Hailsham concluded this part of the case by saying:

> The fact is, and I hope that it will never be necessary to say so again, that in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.

In our view, every word of what Lord Hailsham said regarding the status of judgments and relevance of precedent in the House of Lords, the circumstances, the duty of the Court of Appeal to accept loyally the decisions of the House of Lords and the chaotic consequences which would follow should the Court of Appeal fail in this duty apply with full force, mutatis mutandis, to this country and we adopt what his Lordship

said. Clearly, the Court of Appeal in *Harta Empat* flew in the face of the principles enunciated by Lord Hailsham and we can only express the hope that it will not be necessary for the Federal Court hereafter to have to remind the Court of Appeal of those principles.

We now move on to consider whether the decision of this court in *Feyen* was given per incuriam.

During the argument before us in *Feyen*, counsel for the chargor had relied on s 241(3)(a) of the Code. Counsel for the chargee's response to this was that if s 133(5) of the Act preserved the validity of the charges concerned, then s 241(3) of the Code — and we would add, by the same token, s 301(c) of the Code — would have no application. We considered that counsel for the chargee was plainly correct in this contention and that was why we had held that no 'cause to the contrary' within the meaning of s 256(3) of the Code had been shown.

By way of amplification, we would add that notwithstanding the breach of sub-s (1) of s 133 of the Act, having regard to the effect of the all-important sub-s (5) of s 133 as explained by us in *Feyen*, sub-s (1) of s 133 is neither a prohibition nor a limitation within the meaning of sub-s (3)(a) of s 241 or s 301(c) of the Code respectively. In the words of Gibbs CJ in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410:

> ... it is possible for a statute in terms to prohibit a contract and yet to provide expressly or impliedly, that the contract will be valid and enforceable.

This proposition is strikingly illustrated by the decision of the Judicial Committee of the Privy Council in *Batu Pahat Bank Ltd v The Official Assignee* [1933] MLJ 237, which is precisely in point.

In *Batu Pahat Bank*'s case, the Judicial Committee of the Privy Council was concerned with the question whether a breach of s 111(3) of the Companies Ordinance, which provided that no banking company shall lend any part of its funds on the security of its own shares, operated to invalidate the security or whether it merely prohibited the making of a loan on security under pain of incurring the specified penalties and liabilities.

In answering this question in favour of the appellant bank, their Lordships recognized that the crucial point turned upon the true construction of the section and went on to say this (at pp 238–239):

> Their Lordships can do no other than say that sub-s (4) means what it says, and that it deals with any loan made in contravention of the section, including, therefore, a loan by a banking company of part of its funds upon the security of its shares. If that event happens, sub-s (4) specifies the consequences, and they include a personal liability on directors and managers for 'the payment of any portion of the amount lent which remains unpaid after deducting the amount realized on the securities'. This is a recognition by the subsection of two things, viz: (1) the continuance of the security on which the loan was made; and (2) the discharge of the debt *pro tanto* by the proceeds of its realization. In the face of this, it seems to their Lordships impossible to say that s 111(3) operates to invalidate a lien which would, apart from that subsection, be an effective lien.

It follows that both sub-s (3)(a) of s 241 and s 301(c) of the Code were utterly irrelevant to the issues which arose for decision in *Feyen*, and for that reason, were not even mentioned therein. It also follows that our judgment in *Feyen* on the point at issue was not given per incuriam. On the contrary, it was the judgment of the Court of Appeal in *Harta Empat* which was given per incuriam, for it entirely overlooked the provisions of sub-s (5) of s 133 of the Act which would have been fatal to its reasoning.

That, however, does not conclude our comments on *Harta Empat*. With respect, anyone reading the judgment of the Court of Appeal in *Harta Empat* should not be blamed if he is left with the distinct impression that it was an indirect attempt at resurrecting the decision in *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1992] 2 MLJ 365 — a decision which had been expressly overruled in *Feyen*. For the avoidance of doubt, we have to point out that *Che Wan*, which had been interred by *Feyen*, remains interred — in other words, remains overruled.

For the various reasons stated, having carefully studied the judgment of the Court of Appeal in *Harta Empat*, we are not persuaded to depart from anything we had said in *Feyen* and so, even assuming for one moment that we have the power to rectify, there is nothing for us to rectify. In short, whilst we are not at liberty to overrule *Harta Empat* since it is the subject of a pending application for leave to appeal to the Federal Court, we are at liberty to say — and we do say — that in our view, the decision in *Harta Empat*, cannot stand with our decision in *Feyen*.

In the second place, we should like to deal with the contention of counsel for Feyen that the Federal Court in *Feyen* was mistaken when it treated the effect of a breach of s 133(1) of the Act on the validity of the charges under the Code as the sole question for decision when it was merely a preliminary question of law. It was argued that having held against the chargor on this point, the Federal Court should have remitted the proceedings to the High Court with a direction to hear and determine any other grounds the chargor might wish to advance for the purpose of establishing the existence of 'cause to the contrary' within the meaning of s 256(3) of the Code.

Having regard to the course which the proceedings took from first to last beginning in the High Court and ending on appeal before us — a clear outline of which appears in the affidavit of Mr Selvathesan a/l Jagasothy affirmed on 20 March 1997 — it was plain as a pikestaff that the question whether a breach of s 133(1) of the Act operates to invalidate the charges and loan transactions was not a preliminary point at all for it dealt with the whole subject matter of the action without the need for viva voce evidence.

To make this point clear, it will suffice if we quote with approval the following passages in that affidavit:

> As regards the defendant's contention that *Feyen* only decided on a preliminary issue, I am advised by my solicitors and verily believe as follows:
>
> The appeal herein involved two originating summonses, namely, Originating Summons No 31–266–1986 and Originating Summons No 31–351–1988 filed by the plaintiff and a writ action, namely Civil Suit No 22–18–1991 filed by the defendant. The said originating summonses and the said writ action were consolidated and heard together as one action.

None of the issues it is now raising were either pleaded or raised.

Prior to the hearing before the learned judge of the High Court, counsel for the defendant and the former counsel for the plaintiff entered into a statement of agreed facts and issues. Paragraph 11 states as follows:

> 'The sole preliminary issue before the High Court is to determine the effect of the breach of s 133 of the Companies Act 1965 *and consequently the validity of the charges created and to make the necessary consequential orders.*' (Emphasis added.)

It is clear from this paragraph that the parties agreed that the validity of the charges depended solely on the determination of the effect of the breach of s 133.

Counsel for the defendant at paras 2 and 4 of his written submission (at p 72 of the appeal record) states as follows:

'(a) The chargor defendant has to show cause to the contrary under s 256(3) of the National Land Code 1965; *the cause being that the charges created are invalid and void ab initio having been prohibited by statute: s 133 of the Companies Act 1965 that prohibits such a transaction.* (Emphasis added.)

(b) In all these three consolidated actions — two charge actions and one suit — the parties are the same and the parties have produced agreed facts and issues dated 24 June 1993 and filed in court. *Therefore, it is not necessary to take viva voce evidence.*' (Emphasis added.)

Further the learned judge of the High Court in his judgment also stated as follows:

> 'In the three consolidated actions, the parties are the same and these parties have submitted the agreed facts and issues dated 24 June 1993 and filed in the court. *Hence in this case there is no need to take oral evidence.*' (Emphasis added.)

The question of the validity of the charges was never dealt with by this court or for that matter by the parties as a preliminary issue. At no time during the appeal did the defendant refer to this question as being a preliminary issue and at no time did the defendant raise any objections to the remittance of the case to the High Court with a direction to grant the orders for sale, though the defendant had several opportunities to do so:

(a) After delivering the judgment of the court on 28 September 1995, this court asked counsel present whether they had anything to say. Counsel for the defendant could have at that time informed the court, if he so believed, that s 133 was only a preliminary issue and that therefore the direction to the High Court to grant the orders for sale ought not to be made.

(b) On 5 December 1995, two copies of the draft orders were sent to the solicitors for the defendant for approval. The solicitors for the defendant did not at that time inform the solicitors for the plaintiff that they would be making an application to rectify the direction made by this court and that the finalization of the order ought to be stayed.

The judgment in *Feyen* was delivered on 28 September 1995. The judgment in *Harta Empat* was delivered on 24 January 1997. The motion herein was filed on 13 February 1997. It has purportedly taken the defendant more than a year and three months to realize that the Federal Court's decision was in respect of a preliminary issue only.

Prior to the hearing proper, the plaintiff had applied to set aside the statement of agreed facts and issues in order to raise matters outside of the same. The application was resisted by the defendant and the Federal Court

had ruled in favour of the defendant holding that the parties are confined to the statement of agreed facts and issues. A

Furthermore, we would interpolate to remark, with respect, that the sequence of events traced in the affidavit aforesaid provides considerable justification for the criticism that the present application was inspired by the judgment of the Court of Appeal in *Harta Empat* and is clearly an attempt to invite us to re-visit *Feyen* and to reverse it in the light of *Harta Empat*. B

We now move on to consider a further contention advanced by counsel for the chargor.

In the third place, it was contended that the Federal Court — having held against the chargor on the s 133(1) of the Act point — should have remitted the proceedings to the High Court at Seremban, with a direction to hear and determine any other grounds the chargor might wish to advance to show the existence of 'cause to the contrary' within the meaning of s 256(3) of the Code, and had it so directed, the chargor would have put forward the following further objections: C D

(a) that the Federal Court in *Feyen* had no jurisdiction to direct the High Court to order the sale of the land held under EMR 655 Lot 1519, Mukim Ampangan, Town and District of Seremban, it being held under land office title; having regard to the provisions of s 260(2) of the Code which gives this jurisdiction to the land administrator. It was pointed out that it is only when there have been two unsuccessful attempts to sell land office land by public auction under the land administrator's order that the land can be withdrawn from the sale and referred by the land administrator to the High Court, in which event, the High Court may substitute, for the order of the land administrator, an order for sale under s 256 of the Code (see s 265(2), (3)(a), (b) and (c) of the Code). It was said that in the present case, there had been neither an order for sale by the land administrator nor a reference by him to the High Court with the result that the Federal Court had no jurisdiction to make the remit to the High Court with the direction aforesaid; E F G

(b) that the chargee had charged penalty interest; and

(c) that consequent to the decision of the High Court in favour of the chargor, the memorials relating to the charges concerned both in the issue documents of title and in the relevant register documents of title had been cancelled but after the chargee's successful appeal from that decision to this court, the memorials had been restored, although there had been no order of this court authorizing the same. H

As to ground (a), which raises a question of jurisdiction, all we need say is that it is perfectly baseless for it is flatly contradicted by a copy of the Order for Sale by the Land Administrator dated 24 June 1987 annexed to the affidavit of Mr Selvathesan a/l Jagasothy, an appointee of the chargee under reg 9(1) of the Essential (Protection of Depositors) Regulations 1986 by the Central Bank of Malaysia and the Reference by the Land I

A Administrator to the High Court made pursuant to s 265(3)(b) of the Code, which appears at p 278 of the Record of Appeal. We note in passing that the jurisdiction point was not taken before the Judge in the court below and we have no doubt that had it been taken, it would have been given short shrift.

B As to ground (b), which alleged that the chargee had charged penalty interest, the record of appeal provided showed that Mr Selvathesan a/l Jagasothy, the appointee of the chargee under reg 9(1)(b) of the Essential (Protection of Depositors) Regulations 1986, had gone on affidavit to deny this allegation, but even if the allegation were true, this would not amount to 'cause to the contrary' within the meaning of s 256(3) of the C Code (see *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77).

As to ground (c), which questions the validity of the restoration of the memorials relating to the charges concerned both on the issue documents of title and the relevant registers document of title, this submission is devoid of all substance. In allowing the appeal, this court had set aside the D judgment of the High Court — that is to say, the whole of that judgment including the order directing cancellation of the memorials aforesaid. The parties were thus restored to the status quo ante, and there was thus clear authorization for the memorials concerned to be restored.

A final point is worth making. The High Court at Seremban will, E without further ado — and in accordance with our directions appearing in the penultimate para of our judgment in *Feyen* (at p 330) — make the orders referred to therein. It goes without saying that the orders for sale of the charged lands to be made by the High Court shall provide for the sale to be by public auction, require the sale to be held on a date specified therein and specify the total amounts due to the chargee under the charges F as at the date on which the orders for sale are made, in accordance with s 257(1)(a), (b) and (c) of the Code respectively.

It follows, therefore, that the sole question for decision before the High Court will be the total amounts due to the chargee under the charges as at the date on which the orders for sale are made and upon this G question, the chargor Feyen shall have the opportunity of being heard.

In the result, for the reasons hereinbefore stated, we unanimously hold that this application is misconceived and must be, and is, dismissed with costs.

H *Application dismissed.*

Reported by Kenneth Goh

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